86-1024

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONFERENCE OF STATE BANK SUPERVISORS,
FLORIDA DEPARTMENT OF BANKING AND FINANCE,
FLORIDA BANKERS ASSOCIATION and
SUN BANK/PALM BEACH,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
and U.S. TRUST CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 3(d) of the Bank Holding Company Act—popularly known as the "Douglas Amendment"—whose clear purpose, as enacted in 1956 and as amended in 1966, was to prevent bank holding companies from acquiring deposit-taking banks across state lines without state authorization, no longer applies to interstate acquisitions of deposit-taking banks that do not make commercial loans, because of a 1970 amendment that changed the definition of "bank" in Section 2(c) of the Act to exclude institutions not engaged in the business of making commercial loans.

2. Whether the court below failed to follow clearly applicable decisions of this Court with respect to the construction of amending statutes when it concluded that the amended definition of "bank" in Section 2(c) of the Act, as interpreted by this Court in *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986), must be applied automatically to the term "additional bank" in Section 3(d), the Douglas Amendment, even though the court below found that such application would defeat the clearly defined congressional purpose embodied in the Douglas Amendment.

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Petitioners, Conference of State Bank Supervisors ("Conference"), Florida Department of Banking and Finance ("Department"), Florida Bankers Association ("Association") and Sun Bank/Palm Beach,[1] respectfully

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[1] The Conference is the professional organization of the state government officials responsible for regulating over 10,000 state-chartered banks in the 50 states and in Guam, Puerto Rico and the Virgin Islands. The Department is the Florida state agency responsible, *inter alia*, for regulating state-chartered banks in Florida. The Association is a membership association representing over 90

pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on October 6, 1986.

OPINIONS BELOW

The two opinions below of the Eleventh Circuit Court of Appeals are reported at 760 F.2d 1135 and 800 F.2d 1534, and appear in the Appendix ("App.") beginning at 10a and 46a, respectively. The order of the Federal Reserve Board is reported at 70 Fed. Res. Bull. 371 and appears at App. 1a.

JURISDICTION

The final judgment of the Court of Appeals was entered on October 6, 1986 (App. 46a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Statutory Appendix, *infra*, pp. 20-21.

STATEMENT

This case arises out of an order of the Federal Reserve Board ("Board") which, for the first time since the enactment in 1956 of the Bank Holding Company Act, 12 U.S.C. §§ 1841-50 ("Act"), allowed a bank holding company to acquire a deposit-taking bank in another state without that state's specific statutory authorization pursuant to Section 3(d) of the Act, popularly known as the "Douglas Amendment."[2] The Board's order permitted

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percent of the commercial banks and bank holding companies headquartered in Florida. Sun Bank/Palm Beach is a state-chartered bank, headquartered in Palm Beach, Florida, which is a subsidiary of SunTrust Banks, Inc.

[2] The Douglas Amendment provides that a bank holding company may *not* acquire "any additional bank" located outside of the state in which the holding company's principal banking subsidiaries are

U.S. Trust Corporation ("U.S. Trust"), a registered New York bank holding company, to establish a subsidiary national bank, U.S. Trust Company of Florida, N.A. ("U.S. Trust-Florida"), in Palm Beach, Florida.[3] Petitioners challenged U.S. Trust's unprecedented application on the ground that U.S. Trust's acquisition of a deposit-taking national bank in Florida *without* Florida's specific authorization would violate the Douglas Amendment. In response, U.S. Trust argued that its acquisition was not subject to the Douglas Amendment because U.S. Trust-Florida would not make commercial loans and therefore would not fall within the literal definition of "bank" in Section 2(c) of the Act, as *amended* in 1970.[4]

The Board acknowledged that U.S. Trust's application presented a "serious potential for undermining the policies of the Act," because U.S. Trust's proposed acquisition, if repeated by other bank holding companies, would "defeat[]Congressional policies . . . with respect to limitations on interstate banking."[5] Nevertheless, the Board concluded that, since U.S. Trust-Florida would not make

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located *unless* such an acquisition is "specifically authorized by the statute laws of the State in which such bank is located." 12 U.S.C. § 1842(d).

[3] U.S. Trust had previously operated a state-chartered *nondeposit* trust company in Palm Beach. U.S. Trust received permission from the Comptroller of the Currency to convert this nondeposit trust company into a chartered national bank, and then obtained Board approval to expand the bank's activities to include (i) the acceptance of demand deposits and savings accounts, which would be insured by the Federal Deposit Insurance Corporation ("FDIC"), and (ii) the making of consumer loans. *See* 760 F.2d at 1137, App. 13a-14a; 70 Fed. Res. Bull. at 371-372, App. 1a-2a.

[4] Section 2(c) of the Act, as amended in 1970, defines "bank," in pertinent part, to include each institution "which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." *See* Act of Dec. 31, 1970, Pub. L. No. 91-607, § 101(c), 84 Stat. 1761.

[5] 70 Fed. Res. Bull. at 372, 373, App. 3a, 6a.

commercial loans, the Board was "constrained by the definition of bank in [Section 2(c) of] the Act to approve the application." [6]

Petitioners sought review of the Board's order in the Eleventh Circuit Court of Appeals pursuant to 12 U.S.C. § 1848. In its initial decision, the Court of Appeals concluded that the Board's order would "destroy the important federal policy embodied in the Douglas Amendment." [7] The Court of Appeals found that this congressional policy—namely, "to prohibit the creation of interstate deposit-taking networks by bank holding companies without specific state authorization" (760 F.2d at 1141, App. 22a)—had been enacted in 1956 and reaffirmed in 1966, and had *not* been rescinded by the 1970 amendment to Section 2(c).[8] The Court of Appeals therefore reversed the Board's order.[9]

Following the Eleventh Circuit's initial decision, U.S. Trust petitioned this Court for a writ of certiorari. On January 27, 1986, this Court granted U.S. Trust's petition, vacated the Eleventh Circuit's initial decision, and remanded this case to the Court of Appeals "for further

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[6] 70 Fed. Res. Bull. at 372, App. 3a.

[7] 760 F.2d at 1143, App. 27a.

[8] The Court of Appeals could find no evidence of any "change in congressional intent" in 1970 with respect to the Douglas Amendment. The Court therefore held that it was unreasonable "to conclude that Congress intended in 1970 to destroy the Douglas Amendment by adopting an amendment to the definition of bank which would permit bank holding companies to establish an unlimited number of deposit-taking banks across state lines without state approval." 760 F.2d at 1141, App. 23a.

[9] The Court of Appeals held that the Board should have denied U.S. Trust's application pursuant to its authority to "prevent evasions" of the Act under Section 5(b) thereof, 12 U.S.C. § 1844(b). In this regard, the Court held that U.S. Trust's application was "a violation of the Douglas Amendment" and an "evasion . . . of the fundamental purposes of the Act." 760 F.2d at 1143, App. 26a-28a.

consideration in light of *Board of Governors v. Dimension Financial Corp.*," 106 S. Ct. 681 (1986), App. 30a ("*Dimension*").[10]

In *Dimension* this Court had struck down a regulation of the Board which adopted a broader definition of "bank," for purposes of the entire Act, than the explicit statutory definition contained in Section 2(c), as amended in 1970. The Board's regulation enlarged the statutory definition of "bank" by adopting new definitions of "demand deposits" and "commercial loans." This Court held that the Board's regulation was contrary to the plain language and legislative history of Section 2(c), and could not be justified by the Board's self-created policy of regulating all institutions that were "functionally equivalent" to banks. This Court, however, did *not* consider the Douglas Amendment in *Dimension*, nor did it address the issue of whether bank holding companies which already owned "banks" as defined in Section 2(c) could proceed to acquire additional deposit-taking banks across state lines without regard to the Douglas Amendment.

On remand, the Eleventh Circuit reiterated its original conclusions as to (i) the scope and purpose of the Douglas Amendment, and (ii) the lack of any evidence that Congress intended, by its amendment of the definition of "bank" in 1970, to authorize bank holding companies to make interstate acquisitions of deposit-taking banks without state authorization.[11] Nevertheless, the Eleventh Circuit held that this Court's decision in *Dimension* required affirmance of the Board's order. The Eleventh Circuit concluded that the definition of "bank" in Section *2(c)*, as interpreted by this Court in *Dimension*, must be automatically applied to the term "additional bank" in Section *3(d)*, the Douglas Amendment, even though the result

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[10] *U.S. Trust Corp. v. Board of Governors*, 106 S. Ct. 875, 876 (1986), App. 45a.

[11] 800 F.2d at 1535-36 and n.2, App. 48a-49a.

"clearly frustrates the congressional purpose expressed in the Douglas Amendment." [12] Thus, the sole basis for the Eleventh Circuit's final judgment was its holding that the same definition of "bank" must be applied in both Section 2(c) and Section 3(d) regardless of the actual intent of Congress.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is Contrary to the Explicit Mandate of Congress in the Douglas Amendment, and It Involves a Question of Great Importance to the Regulation of Banking in the United States.

This case involves an issue, of first impression in this Court, which is of great significance to the U.S. banking industry. It involves an important area of federal-state relations, namely, the authority of each state under the Douglas Amendment to regulate the interstate expansion of bank holding companies. The question is whether the Federal Reserve Board may permit regulated bank holding companies to acquire deposit-taking banks across state lines *without* specific state authorization, as long as such banks do not make commercial loans.

Petitioners contend, and the Board and the Court of Appeals have acknowledged,[13] that the Board's action in this case is contrary to the long-established congressional purpose embodied in the Douglas Amendment. This Court recognized in *Northeast Bancorp, Inc. v. Board of Governors*, 105 S. Ct. 2545 (1985) (*"Northeast Bancorp"*), that the Douglas Amendment provides broad authority to each state to regulate the degree to which banks may be acquired within its borders by out-of-state bank holding companies.[14] In view of the broad authority

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[12] 800 F.2d at 1537, App. 51a.

[13] 70 Fed. Res. Bull. at 372-73, App. 3a-6a; 760 F.2d at 1141-43, App. 22a-27a.

[14] As noted by this Court, Senator Douglas described his Amendment as a provision which would allow bank holding companies to

granted to the states by the Douglas Amendment, this Court held that states could "partially lift the ban on interstate banking without opening themselves up to interstate banking from everywhere in the Nation." 105 S. Ct. at 2553.

The Board's U.S. Trust order, however, for the first time since the Act was passed in 1956, has permitted a bank holding company to acquire a deposit-taking bank across state lines *without* state authorization, if that bank refrains from making commercial loans. Not surprisingly, the Board's order triggered an "avalanche" of similar applications by bank holding companies to establish more than 200 deposit-taking banks across state lines.[15] Although the Board temporarily suspended processing of these applications on March 15, 1985,[16] the General Counsel of the Board recently stated that the Board will soon begin deciding these applications in view of the decision below by the Eleventh Circuit.[17]

The great majority of the foregoing applications have been filed by bank holding companies which seek to evade the limitations on interstate expansion that have been imposed by regional interstate statutes adopted by Florida, 26 other states and the District of Columbia.[18] These

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acquire banks in other states "*only to the degree* that State laws expressly permit them." 102 Cong. Rec. 6858 (1956) (emphasis added), *quoted in Northeast Bancorp*, 105 S. Ct. at 2552.

[15] 760 F.2d at 1138, App. 16a; "Banks Rush to Stake Out Interstate Claims," Am. Banker, April 30, 1984, at 1, 7-9.

[16] *Suspension of Processing of Applications to Acquire Nonbank Banks*, 71 Fed. Res. Bull. 323 (1985).

[17] 47 Wash. Fin. Rep. 702 (Nov. 3, 1986).

[18] For a list of states enacting regional laws, *see* CCH Fed. Bank. L. Rep. ¶ 3106, and 47 Wash. Fin. Rep. 352-53 (Sept. 9, 1986).

regional statutes allow entry *only* by those out-of-state bank holding companies that are located within a defined geographic region.[19] In *Northeast Bancorp*, 105 S. Ct. at 2553, this Court upheld such statutes on the ground that the Douglas Amendment authorizes any state to pursue a limited, regional banking approach that "allow[s] expansion and growth of local banks without opening [its] borders to unimpeded interstate banking."

However, the decision below will speedily and irretrievably undermine State regional banking statutes, because it permits all out-of-state bank holding companies from every region to acquire deposit-taking banks in the relevant states. Thus, in contravention of the clear mandate of the Douglas Amendment as interpreted in *Northeast Bancorp*, the decision below has opened up Florida and other states to "unimpeded interstate banking" without their consent.[20] The result will be to render *Northeast Bancorp* a hollow victory for the states.

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[19] For example, Fla. Stat. Ann. § 658.295 (1984) provides that an out-of-state bank holding company may acquire a Florida bank whose deposits are insured by the FDIC only if the principal place of business of the holding company and more than 80 percent of the total deposits held by its bank subsidiaries are located within a defined "Region" consisting of 12 Southeastern states and the District of Columbia. New York is not included within the defined "Region." Thus, Section 658.295 affirmatively *prohibits* New York bank holding companies, such as U.S. Trust, from acquiring FDIC-insured, deposit-taking Florida banks such as U.S. Trust-Florida.

[20] Regulated bank holding companies are already permitted under 12 C.F.R. § 225.25(b)(1) to engage in commercial lending activities on a nationwide scale through nonbanking subsidiaries. Accordingly, if bank holding companies are permitted to establish deposit-taking banks in every state pursuant to the decision below, such companies will be able, as a practical matter, to establish a nationwide full-service banking business without regard to the Douglas Amendment and state law.

II. The Decision Below Ignored Clearly Applicable Decisions of this Court with Respect to the Construction of Amending Statutes, and It Misconstrued this Court's Decision in *Dimension*.

A. The Court Below Erred in Holding that the Term "Additional Bank" in the Douglas Amendment Must Be Given Exactly the Same Meaning as the Term "Bank" in Section 2(c).

The Court of Appeals' final decision was based solely upon its holding that the definition of "bank" in *Section 2(c)*, as construed by this Court in *Dimension*, must be automatically applied to the term "additional bank" in *Section 3(d)*, the Douglas Amendment.[21] This holding is contrary to a series of cases in which this Court has held that a word *can* have different meanings in different sections of a single statute, even if the word has been expressly defined in one section. In *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932), this Court declared that the

> natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . *is not rigid and readily yields* whenever there is such a variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. . . .
>
> It is not unusual for the same word to be used with different meanings in the same act, and *there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance.*[22]

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[21] The Court of Appeals, invoking an "elementary precept of statutory construction," stated that the definition of "bank" in Section 2(c) "controls the construction of the term wherever it appears throughout the statute." 800 F.2d at 1536, App. 51a.

[22] 286 U.S. at 433 (citations omitted; emphasis added). *Accord, Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87-88 (1934)

Atlantic Cleaners held that the term "trade or commerce" had a *different* and broader meaning for purposes of Section 3 of the Sherman Antitrust Act than the same term had for purposes of Section 1 of that Act. Similarly, in *Cass v. United States*, 417 U.S. 72 (1974), this Court held that a proviso in 10 U.S.C. § 687(a)(2), which expressly defined "a part of a year that is six months or more . . . as a whole year," was intended to apply in calculating the "years of active service" of a former Armed Forces reservist in determining the amount of his readjustment pay, but was *not* intended to apply to the requirement that a reservist must have completed "at least five years of continuous active duty" before he could collect any readjustment pay. In view of the statute's clear purpose to require *five full years* of active duty for eligibility, this Court refused to apply the statutory definition in a manner that would reduce the eligibility requirement to four and one-half years.[23]

The flexible and realistic approach of this Court toward statutory construction in *Atlantic Cleaners* and *Cass* is consistent with this Court's oft-repeated admonition that a statutory definition should not be applied "mechanically"

(holding that the term "obligations" had different meanings in Sections 213(b)(4) and 217(a) of the Revenue Act of 1926); *Farmers Reservoir & Irrigation Co. v. Macomb*, 337 U.S. 755, 764-66 (1949) (holding that the word "production" in Section 3(f) of the Fair Labor Standards Act had a meaning which was different from the definition of "production" contained in Section 3(j) of the same Act); *District of Columbia v. Carter*, 409 U.S. 418, 420-21 (1973) (holding that the District of Columbia is not a "State or Territory" within 42 U.S.C. § 1983, even though it is a "State and Territory" within 42 U.S.C. § 1982).

[23] In deciding to follow the manifest congressional purpose of the eligibility requirement in 10 U.S.C. § 687(a), instead of the definitional proviso, this Court said: "In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." 417 U.S. at 83, *quoting Schmid v. United States*, 193 Ct. Cl. 780, 789, 436 F.2d 987, 992 (Nichols, J., dissenting), *cert. denied*, 404 U.S. 951 (1971).

in a manner which would "defeat the purpose of the legislation." [24] As recognized by the Court of Appeals itself, a literal insertion of the Section 2(c) definition of "bank" into the term "additional bank" in Section 3(d) "clearly frustrates the congressional purpose expressed in the Douglas Amendment." [25] Moreover, in cases such as this one, where the statutory definition of "bank" was amended in 1970 in a way that appeared to be inconsistent with the purpose of the Douglas Amendment but without any indication of a congressional intent to rescind that purpose, this Court has refused to hold that the statutory purpose has been ousted by the subsequent amendment to the definition.[26]

B. This Court Did Not Decide the Douglas Amendment Issue in *Dimension*.

This Court did not address or decide in *Dimension* the issue, presented in this case, of whether the Douglas Amendment continues to apply to *interstate* acquisitions

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[24] *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 412 (1983) (refusing to interpret literal definition of "conveyance" under the Federal Aviation Act in a manner that would conflict with the clear purpose of the Act to require the recordation of every aircraft transfer). *Accord, Farmers Reservoir & Irrigation Co., supra* note 22, 337 U.S. at 764; *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) (refusing to apply technical definitions of "disability" and "injury" under the Longshoremen's and Harbor Workers' Compensation Act in a manner that would impose a liability on employers that was not intended by Congress).

[25] 800 F.2d at 1537, App. 51a. *See also* pages 14-19, *infra*.

[26] *Cass v. United States*, 417 U.S. at 79-83 (holding that the original purpose of Congress to require five full years for eligibility under 10 U.S.C. § 687(a) had *not* been changed by a subsequent amendment to the definition of "year"); *FDIC v. Philadelphia Gear Corp.*, 106 S. Ct. 1931 (1986) (following original purpose of the Federal Deposit Insurance Act of 1933 instead of the literal terms of the 1960 amendment to the definition of "deposit" in that Act). *See also Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974).

by *regulated* bank holding companies of deposit-taking banks that do not make commercial loans.[27] This Court did not consider in *Dimension* whether the 1970 amendment to Section 2(c) of the Act was intended by Congress to remove the prior authority of each state to determine the extent to which deposit-taking banks could be acquired within its borders by out-of-state bank holding companies, even if such banks did not make commercial loans. Indeed, the decision of the Tenth Circuit Court of Appeals in *Dimension*, which this Court affirmed, expressly *declined* to consider the Douglas Amendment question, although the Tenth Circuit did acknowledge that the Douglas Amendment "is a significant factor in the mix of state and federal regulation." 744 F.2d at 1410.

C. This Court's Interpretation of Section 2(c) in *Dimension* Is Compatible with Petitioners' Construction of the Douglas Amendment.

This Court's interpretation in *Dimension* of the definition of "bank" in Section 2(c) does not conflict with Petitioners' suggested construction of the term "additional bank" in the Douglas Amendment. In *Dimension*, this Court struck down a regulation of the Board which sought to expand the statutory definition of "bank" for all purposes of the Act and, thereby, to extend the Board's basic jurisdiction under the Act.[28] The Board's

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[27] In *Dimension*, 106 S. Ct. at 685, App. 35a, this Court did note that the Board had referred in its regulation defining "bank" to "the statutory proscription on interstate banking without prior state approval." However, this Court did not refer to the Douglas Amendment by name, nor did it discuss the legal effect or purpose of that statute.

[28] The definition of "bank" in Section 2(c) determines the general jurisdiction of the Board under the Act. Sections 2(a)(1) and 3(a)(1) of the Act provide that (i) a company must obtain the Board's prior approval in order to acquire "control" of a "bank,"

primary objective in adopting its regulation was to bring *nonbanking* companies, which were *not* otherwise subject to regulation as bank holding companies, *within* the scope of the Act if they acquired institutions that were "the functional equivalent of banks." *See* 106 S. Ct. at 685 and n. 3, App. 35a. The Board urged that its regulation was supported by the "plain purpose" of the Act, but this Court held that Congress had never adopted such a far-reaching policy. *Id.* at 688-89, App. 42a-44a.

In contrast to the sweeping terms of the Board's regulation in *Dimension*, Petitioners seek only to ensure that *regulated bank holding companies*, such as U.S. Trust, which *already* own at least one "bank" as defined in Section 2(c), will not be able to acquire *additional* deposit-taking banks across state lines *unless* they comply with the Douglas Amendment. Therefore, unlike the Board's regulation in *Dimension*, Petitioners' construction of the Douglas Amendment does *not* seek to expand the Board's jurisdiction to embrace holding companies which are not already regulated by the Act.[29] Petitioners' construction of the Douglas Amendment thus does not conflict with this Court's holding in *Dimension* that the Act regulates only those holding companies which control at least one Section 2(c) bank.

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and (ii) upon such acquisition, that company will become a "bank holding company" subject to regulation by the Board under the Act. *See* 12 U.S.C. §§ 1841(a)(1) and 1842(a)(1). For example, a bank holding company is required to "register" with the Board and to file periodic reports under 12 C.F.R. § 225.5, and it must comply with the Board's regulations in acquiring additional subsidiary banks or nonbanking subsidiaries. *See* 12 U.S.C. §§ 1842 and 1843, and 12 C.F.R. §§ 225.11-225.25.

[29] U.S. Trust owns a "bank," as defined in Section 2(c), which accepts demand deposits, makes commercial loans and is located in New York. 760 F.2d at 1137, App. 14a. Accordingly, U.S. Trust is already subject to the Board's jurisdiction under the Act.

D. There Is No Indication that Congress Intended, by Amending the Definition of "Bank" in 1970, to Emasculate the Long-standing Control of the States Over Interstate Acquisitions of Deposit-Taking Banks.

The Court of Appeals properly concluded in its initial decision that the Douglas Amendment, as enacted in 1956 and amended in 1966, was intended "to prohibit the creation of interstate deposit-taking networks by bank holding companies without specific state authorization." 760 F.2d at 1141, App. 22a. The Court of Appeals also correctly found, in both of its opinions, that there is no evidence to indicate that Congress intended to repeal or "emasculat[e]" the Douglas Amendment when it revised the definition of "bank" (but *not* the Douglas Amendment) in 1970.[30] Accordingly, in view of the decisions of this Court in the similar cases discussed above,[31] the Court of Appeals in its final judgment should have reaffirmed its initial holding that the 1970 amendment to Section 2(c) did not rescind the Douglas Amendment's bar against interstate acquisitions of deposit-taking banks.

1. *The 1956 Act*

The Douglas Amendment was added on the floor of the Senate to the original Bank Holding Company Act of 1956. *Northeast Bancorp*, 105 S. Ct. at 2551. Senator Douglas declared that his Amendment was intended to

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[30] 800 F.2d at 1535-36 and n.2, App. 48a-49a ("Nowhere in the legislative history of the Act's changing definition of 'bank' is there the slightest hint that Congress considered the effect of the amendments on the Douglas Amendment, nor is there a hint that Congress conceived that a bank holding company could gain an interstate bank charter without state approval.") *See also* 760 F.2d at 1140-42, App. 23a-25a (unreasonable to conclude that the 1970 amendment to Section 2(c) was intended to cause "a total emasculation of the long held policy giving states control over bank expansion").

[31] *See* notes 22-26, *supra*, and accompanying text.

"prevent an undue concentration of banking and financial power" by prohibiting bank holding companies from continuing to acquire deposit-taking banks across state lines, "unless the States give them explicit permission to do so." 102 Cong. Rec. 6857-59 (1956).

In this regard, Senator Douglas drew a close analogy between his Amendment and the McFadden Act, 12 U.S.C. § 36. Under the McFadden Act, national banks may establish branches only *within* their home state and only to the degree permitted to state banks under state law. *E.g.*, *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). The Douglas Amendment was specifically intended to prevent bank holding companies from continuing to evade the McFadden Act's prohibition against interstate branching through the device of establishing separate bank subsidiaries in different states. 102 Cong. Rec. 6858 (1956).[32]

Under the McFadden Act, the *acceptance of deposits* through a remote facility is sufficient *without more* to constitute "branching."[33] Thus, U.S. Trust would have been barred under the McFadden Act from establishing a national bank in New York with a deposit-taking branch in Florida. In view of the purpose of the Douglas Amendment to prevent evasions of the McFadden Act, the Douglas Amendment clearly prohibited U.S. Trust,

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[32] See *Northeast Bancorp*, 105 S. Ct. at 2552-53. Indeed, Senator Douglas declared that his Amendment was "a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy." 102 Cong. Rec. 6860 (1956).

[33] The McFadden Act defines "branch" to include "any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f). The exercise of *any one* of the three enumerated functions at a remote facility will make that facility a "branch." *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 134-35 (1969).

whose principal subsidiary bank is in New York, from establishing an additional deposit-taking subsidiary bank in Florida.

The definition of "bank" in Section 2(c) of the original 1956 Act included all chartered banks.[34] Therefore, under the literal terms of the 1956 Act, the Douglas Amendment was plainly intended to apply to every interstate acquisition of a deposit-taking bank by a bank holding company. The Douglas Amendment's ban on interstate acquisitions of deposit-taking banks, absent state approval, reflected Congress' long-standing concern that banking, and especially the taking of deposits, should be subject to "local, community-based control." *Northeast Bancorp*, 105 S. Ct. at 2553.[35]

2. *The 1966 Amendments*

In 1966, Congress specifically acted to strengthen the Douglas Amendment. First, Congress removed an unintended loophole from the Douglas Amendment by precluding the possibility that a bank holding company could establish its principal office in one state and its principal

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[34] The original 1956 definition of "bank" included "any national banking association or any State bank, savings bank or trust company." Act of May 9, 1956, ch. 240, § 2(c), 70 Stat. 133.

[35] Senator Douglas and his supporters (as well as those in the House of Representatives who passed an earlier bill completely banning interstate bank acquisitions but accepted the Douglas compromise) concluded that state control over the acquisition of deposit-taking banks was necessary to ensure a decentralized banking system which would avoid an undue concentration of control over credit and would be responsive to local consumer and business needs. *See* 102 Cong. Rec. 6857-59 (1956) (remarks of Sen. Douglas); *id.* at 6862 (statement by Sen. Payne and remarks of Sen. Morse); H.R Rep. No. 609, 84th Cong., 1st Sess. 2, 6, 14-15 (1955); 101 Cong. Rec. 3822-24 (1955) (remarks of Rep. Spence, chairman of the House Banking and Currency Committee, quoting a speech by Speaker of the House Rayburn); *id.* at 8028-31, 8033-34 (remarks of Representatives Patman, Rains and Marshall); 102 Cong. Rec. 7165 (1956) (remarks of Rep. Spence, endorsing the Douglas Amendment).

bank subsidiaries in another state and then claim that it had *two* "home states" in which it could acquire deposit-taking banks without state authorization.[36]

Second, Congress repealed the 1956 Act's exemption for regulated investment companies,[37] thereby prohibiting any further interstate expansion by Financial General Corp., an investment company which controlled 21 banks in five states and the District of Columbia.[38] Finally, Congress amended the definition of "bank" in Section 2(c) by adopting an explicit *deposit-based* test. Under the 1966 amendment, the term "bank" included "any institution that accepts deposits that the depositor has a legal right to withdraw on demand. . . ." [39] This amendment confirmed that all banks accepting demand deposits would be subject to the Douglas Amendment.

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[36] The 1966 amendment to Section 3(d) of the Act (i) confirmed that the "home state" of each bank holding company would be the state in which its "principal operations" were conducted (*i.e.*, the state in which the total deposits of its bank subsidiaries were the largest), and (ii) deleted the previous *alternative* designation of "home state" as the state in which the holding company's principal place of business was located. Act of July 1, 1966, Pub. L. No. 89-485, § 7(d), 80 Stat. 237. *See* S. Rep. No. 1179, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 2385 at 2393 (intent of amendment is to "restrict[] expansion [of bank holding companies] to State in which principal operations are conducted").

[37] Act of July 1, 1966, *supra* note 36, §§ 1 and 2, 80 Stat. 236.

[38] S. Rep. No. 1179, *supra* note 36, 1966 U.S. Code Cong. & Ad. News at 2389, 2390.

[39] Act of July 1, 1966, *supra* note 36, § 3, 80 Stat. 236.

The report of the Senate Banking Committee stated that the acceptance of "deposits payable on demand (checking accounts), [is] the commonly accepted test of whether an institution is a commercial bank." S. Rep. No. 1179, *supra* note 36, 1966 U.S. Code Cong. & Ad. News at 2391 (emphasis added), *quoted in Dimension*, 106 S. Ct. at 685 n.2, App. 34a.

3. *The 1970 Amendment to Section 2(c)*

As the Court of Appeals concluded, there is no evidence to suggest that Congress intended the Douglas Amendment to be affected in any way by the 1970 amendment to Section 2(c).[40] The 1970 amendment, which retained the demand deposit test while adding the reference to commercial lending,[41] was introduced in the Senate prior to the Senate committee hearings on the 1970 bills to amend the Act.[42] The only information concerning the amendment that Congress received during the Senate hearings was that the amendment would have "very limited application at present, possibly affecting only one institution." [43] No reference was made during the hearings or the debates concerning any impact of the amendment to Section 2(c) upon the Douglas Amendment.

The Senate committee report on the 1970 amendments to the Act, upon which this Court relied heavily in *Dimension*, stated that the amendment to Section 2(c) would "exclude institutions that are not engaged in the business of making commercial loans from the definition of 'bank.'" [44] However, the Senate report did not mention the Douglas Amendment, and it gave no indication that regulated bank holding companies, such as U.S. Trust, that *already* owned dual-purpose banks, could proceed to

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[40] 760 F.2d at 1140-42, App. 19a-24a; 800 F.2d at 1535-36 and n.2, App. 48a-49a.

[41] *See* note 4, *supra*.

[42] 116 Cong. Rec. 14818-21 (1970) (remarks of Sen. Brooke of Massachusetts).

[43] *One-Bank Holding Company Legislation of 1970: Hearings on S. 1052, et al., before the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 137 (1970) (letter of Gov. J. L. Robertson of the Board to Sen. Sparkman, chairman of the Senate committee).

[44] S. Rep. No. 1084, 91st Cong., 2d Sess. 24 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 5519 at 5541, *quoted in Dimension*, 106 S. Ct. at 687-88, App. 40a-41a.

acquire *additional* deposit-taking banks across state lines without regard to the Douglas Amendment.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the final judgment of the Eleventh Circuit Court of Appeals in this case.

Respectfully submitted,

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STATUTORY APPENDIX

Section 2(a)(1) of the Bank Holding Company Act, 12 U.S.C. § 1841(a)(1), provides in pertinent part:

> "[B]ank holding company" means any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this [Act].

Section 2(c) of the Act, 12 U.S.C. § 1841(c), including the 1970 amendment thereto, provides in pertinent part:

> "Bank" means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, or any territory of the United States . . . , except an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or an institution chartered by the Federal Home Loan Bank Board, which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. . . .

Section 3(a) of the Act, 12 U.S.C. § 1842(a), provides in pertinent part:

> It shall be unlawful except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any

bank holding company to merge or consolidate with any other bank holding company. . . .

Section 3(d) of the Act, 12 U.S.C. § 1842(d), provides in pertinent part:

> Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under Section 1823 (f) of this title) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. . . .